

Memorandum 94-10

**Comprehensive Power of Attorney Statute:
Draft of Final Recommendation (Revised Sections)**

This memorandum forwards revised parts of the Power of Attorney Law recommendation for final approval to print and also considers several points raised in a letter. At the January 7 meeting, the Commission considered the comments on the tentative recommendation and directed the staff to bring back the parts of the recommendation that require final approval. (Additional issues concerning the definition of “capacity” in the power of attorney context will be considered in a supplement to this memorandum.)

A bill is currently under preparation by Legislative Counsel based on the draft statute considered at the January meeting, along with the attached revisions. Since the bill request deadline has passed, any changes made by the Commission will need to be made by amending the bill after it is in print.

Section 4902. Limits on Judicial Review in Power of Attorney

We have also received a letter from Harry P. Drabkin, Deputy County Counsel, Stanislaus County, expressing a concern about the ability of the principal to limit the scope of judicial review. (See Exhibit pp. 11-12.) This issue arises under draft Section 4902:

§ 4902. Effect of provision in power of attorney attempting to limit this part

4902. (a) Except as provided in subdivision (b), this part is not subject to limitation in the power of attorney.

(b) Subject to Section 4903, a power of attorney may expressly eliminate the authority of any person listed in Section 4940 to petition the court for any one or more of the purposes enumerated in Section 4941 or 4942 if both of the following requirements are satisfied:

(1) The power of attorney is executed by the principal at a time when the principal has the advice of a lawyer authorized to practice law in the state where the power of attorney is executed.

(2) The principal’s lawyer signs a certificate stating in substance:

“I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or

her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.”

Comment. Subdivision (a) of Section 4902 continues former Civil Code Section 2422 without substantive change, except that the reference to former Civil Code Section 2420(b) is omitted as surplus. See Section 4050(b)(2) (exclusion of reciprocal or interinsurance exchanges).

Subdivision (b) continues former Civil Code Section 2421(a) without substantive change. This subdivision makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal’s counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this part inapplicable does not affect the right to resort to any judicial remedies that may otherwise be available. See Section 4901 (cumulative remedies).

See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

In general, this section permits a principal, with advice of counsel, to prevent petitions by any one or more of the permissible petitioners in Section 4940 as to any one or more of the purposes described in Section 4941 (non-health powers) or 4942 (health care powers). (See Exhibit pp. 4-7 for the text of these sections.) However, Section 4903 restricts this authority:

§ 4903. Right to petition under power of attorney

4903. Notwithstanding any limitation in the power of attorney:

(a) The conservator of the estate of the principal may petition the court for any one or more of the purposes in Section 4941.

(b) With regard to a durable power of attorney for health care:

(1) The conservator of the person of the principal may petition the court for any of the purposes in subdivisions (a), (c), and (d) of Section 4942.

(2) The attorney-in-fact may petition the court for any of the purposes in subdivisions (a) and (b) of Section 4942.

Comment. Subdivision (a) of Section 4903 continues former Civil Code Section 2421(b) without substantive change.

Subdivision (b) restates former Civil Code Section 2421(c)-(d) without substantive change. This subdivision specifies the purposes for which a conservator of the person or an attorney-in-fact may petition the court under this part with respect to a durable power of attorney for health care. The rights provided by this subdivision cannot be limited by a provision in the power of attorney, but the power of attorney may restrict or eliminate the right of any other persons to petition the court under this part if the principal has the advice of legal counsel and the other requirements of Section 4902 are met.

Under subdivision (b)(1), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 4942(a). The conservator of the person may obtain a court order requiring the attorney-in-fact to report the attorney-in-fact’s acts under the durable power of attorney for health care if the attorney-in-fact fails to submit such a report within 10 days after a written request. See Section 4942(c). The conservator of the person may obtain a court determination that the

durable power of attorney for health care is terminated if the court finds that the attorney-in-fact is acting illegally or is not performing the duty under the durable power of attorney for health care to act consistently with the desires of the principal or, where the principal's desires are unknown or unclear, is acting in a manner that is clearly contrary to the best interests of the principal. See Section 4942(d). See also Section 4942 Comment.

Under subdivision (b)(2), the attorney-in-fact may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 4942(a). The attorney-in-fact may also obtain a court order passing on the acts or proposed acts of the attorney-in-fact under the durable power of attorney for health care. See Section 4942(b).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care” defined).

Mr. Drabkin believes that this scheme is an invitation to “con men” to find a dishonest attorney and evade judicial review. He urges that Section 4902 be revised to provide that it is not subject to limitations in the power of attorney. In support of his argument, he relates an anecdote concerning a case that, as described, does not involve any abuse of the review procedures or attorney certificates. (See Exhibit pp. 11-12.)

The recommendation continues existing law in regard to the scope of permissible limitations on the right to petition. The policy reflected in these sections is to respect the freedom of individuals to arrange their affairs without interference by way of the special probate court proceedings. The statute is drafted so that the principal can exclude petitions by certain individuals whom the principal does not want interfering with the attorney-in-fact who has the principal's confidence. Even where the principal excludes petitions to the maximum extent possible under the section, relief is still possible under the statutory procedure through appointment of a conservator whose authority to petition under Section 4941 cannot be limited. And, as Mr. Drabkin notes, relief through any other procedure is not limited by the statute. The staff believes this remains a sound scheme. It has been in place since 1982 and we are not aware of any problems with it.

Sections 4153 & 4206. Revocation by Conservator

Mr. Drabkin notes an inconsistency between draft Section 4153 [Section 4152 in the Tentative Recommendation], concerning revocation of the attorney-in-fact's authority by the principal's “legal representative” with court approval, and Section 4206(b), concerning the relation of the attorney-in-fact to a court-appointed fiduciary, which specifically lists the conservator of the estate of the

principal. (See Exhibit pp. 12.) These two sections deal with related but distinct matters. Section 4153 is concerned with the *manner* of revocation. Section 4206 is from the Uniform Durable Power of Attorney Act and deals with the *authority* of a fiduciary to revoke. It would be an improvement, however, if Section 4153 referred to Section 4206. The staff recommends that this revision be made. (See Exhibit p. 2 for implementing language.)

Section 4206. Authority of Temporary Conservator

Mr. Drabkin suggests that the statute make clear that a *temporary conservator* is covered by Section 4206. (See Exhibit p. 12.) This would enable a temporary conservator to obtain authority to modify or revoke a durable power of attorney in a manner consistent with the court's order. The staff does not believe that it is necessary to specify temporary conservators in this section. Probate Code Section 2252 provides that a temporary conservator has "such additional powers and duties as may be ordered by the court (1) in the order of appointment or (2) by subsequent order made with or without notice as the court may require." This is more than adequate to permit a temporary conservator to revoke a durable power of attorney pursuant to court authorization. In addition, specifying temporary conservators in Section 4206 could bring into question other statutory references to conservators that do not specifically mention *temporary conservators*. The staff would have no objection, however, to adding a cross-reference to Section 2252 in the Comment to Section 4206 to clarify that a temporary conservator may have the power to revoke if granted by the court. (See Exhibit p. 3.)

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Exhibit

**Redrafted Provisions for Inclusion in
Power of Attorney Law Recommendation**

1 § 4052. Application of division to acts and transactions under power of attorney

2 4052. (a) If a power of attorney provides that the Power of Attorney Law of this
3 state governs the power of attorney or otherwise indicates the principal's intention
4 that the Power of Attorney Law of this state governs the power of attorney, this
5 division governs the power of attorney and applies to acts and transactions of the
6 attorney-in-fact in this state or outside this state where any of the following
7 conditions is satisfied:

8 (1) The principal or attorney-in-fact was domiciled in this state when the
9 principal executed the power of attorney.

10 (2) The authority conferred on the attorney-in-fact relates to property, acts, or
11 transactions in this state.

12 (3) The acts or transactions of the attorney-in-fact occurred or were intended to
13 occur in this state.

14 (4) The principal executed the power of attorney in this state.

15 (5) There is otherwise a reasonable relationship between this state and the
16 subject matter of the power of attorney.

17 (b) If subdivision (a) does not apply to the power of attorney, this division
18 governs the power of attorney and applies to the acts and transactions of the
19 attorney-in-fact in this state where either of the following conditions is satisfied:

20 (1) The principal was domiciled in this state when the principal executed the
21 power of attorney.

22 (2) The principal executed the power of attorney in this state.

23 (c) A power of attorney described in this section remains subject to this division
24 despite a change in domicile of the principal or the attorney-in-fact, or the removal
25 from this state of property that was the subject of the power of attorney.

26 **Comment.** Section 4052 is drawn from the Missouri Durable Power of Attorney Law. See Mo.
27 Ann. Stat. § 404.730(1) (Vernon 1990). In part, this section is comparable to a provision of the
28 Uniform Transfers to Minors Act. See Section 3902 & Comment. The power of attorney may also
29 specify choice of law. Nothing in this section limits the jurisdiction exercisable under Code of
30 Civil Procedure Section 410.10.

31 The rules in this section are subject to the general rules concerning the scope of the Power of
32 Attorney Law set forth in Section 4050. See also Sections 4014 ("attorney-in-fact" defined), 4022
33 ("power of attorney" defined), 4026 ("principal" defined), 4920-4923 (jurisdiction and venue).

34 **Staff Note.** This section has been redrafted to implement decisions at the January 7 meeting.
35 The order of subdivisions (a) and (b) has been reversed to state the more explicit rule first. The

1 provision in subdivision (a) that “this division governs the power of attorney” has been added to
2 avoid unnecessary limitation of the rule. This is consistent with Commission discussions, as well
3 as choice of law rules. See, e.g., Restatement (Second) of Conflict of Laws §§ 6, 187-88, 291-
4 92.(1969).

5 **§ 4053. Recognition of durable powers of attorney executed under law of another state**

6 4053. A durable power of attorney [or similar instrument] executed in another
7 state or jurisdiction in compliance with the law of that state or jurisdiction or the
8 law of this state is valid and enforceable in this state [to the same extent as a
9 durable power of attorney executed in this state], regardless of whether the power
10 of attorney is executed by a domiciliary of this state.

11 **Comment.** Section 4053 is new. This section promotes use and enforceability of durable
12 powers of attorney executed in other states. See also Section 4018 (“durable power of attorney”
13 defined). For a special rule applicable to durable powers of attorney for health care executed in
14 another jurisdiction, see Section 4653.

15 **Staff Note.** This section has been renumbered from 4054, since it is closely related to Section
16 4052. The section has been redrafted to implement decisions made at the January 7 meeting. The
17 staff has also added the words “or the law of this state” for consistency with the health care power
18 rule in Section 4653:

19 **§ 4653. Validity of durable power of attorney for health care executed in another jurisdiction**

20 4653. A durable power of attorney for health care or similar instrument executed in another state
21 or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, shall be
22 valid and enforceable in this state to the same extent as a durable power of attorney for health care
23 validly executed in this state.

24 **Comment.** Section 4653 continues former Civil Code Section 2445 without change. For the rule
25 applicable to powers of attorney generally, see Section 4053.

26 See also Section 4606 (“durable power of attorney for health care” defined).

27 The bracketed clauses in Section 4053 would make these sections consistent, and would enable
28 the deletion of draft Section 4053 in favor of the general provision.

29 **§ 4153. Manner of revocation of attorney-in-fact’s authority**

30 4153. (a) The authority of an attorney-in-fact under a power of attorney may be
31 revoked as follows:

32 (1) In accordance with the terms of the power of attorney.

33 (2) Where the principal informs the attorney-in-fact orally or in writing that the
34 attorney-in-fact’s authority is revoked or when and under what circumstances it is
35 revoked. This paragraph is not subject to limitation in the power of attorney.

36 (3) Where the principal’s legal representative, with approval of the court as
37 provided in Section 4206, informs the attorney-in-fact in writing that the attorney-
38 in-fact’s authority is revoked or when and under what circumstances it is revoked.
39 This paragraph is not subject to limitation in the power of attorney.

1 (b) An attorney-in-fact or third person who does not have notice of the
2 revocation is protected from liability as provided in Chapter 4 (commencing with
3 Section 4300).

4 **Comment.** Section 4153 is new. The rules concerning revocation of the attorney-in-fact's
5 authority by the principal are not as strict as the rules on modification of the power of attorney.
6 Compare subdivision (a)(2) with Section 4150(a)(2). No writing is required to revoke the
7 attorney-in-fact's authority, and if a writing is used, it need not be witnessed or notarized to be
8 effective between the principal and attorney-in-fact.

9 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026
10 ("principal" defined), 4034 ("third person" defined); Civ. Code § 1216 (recordation of revocation
11 of recorded instruments).

12 § 4206. Relation of attorney-in-fact to court-appointed fiduciary

13 4206. (a) If, following execution of a durable power of attorney, a court of the
14 principal's domicile appoints a conservator of the estate, guardian of the estate, or
15 other fiduciary charged with the management of all of the principal's property or
16 all of the principal's property except specified exclusions, the attorney-in-fact is
17 accountable to the fiduciary as well as to the principal. Except as provided in
18 subdivision (b), the fiduciary has the same power to revoke or amend the durable
19 power of attorney that the principal would have had if not incapacitated, subject to
20 any required court approval.

21 (b) If a conservator of the estate is appointed by a court of this state, the
22 conservator can revoke or amend the durable power of attorney only if the court in
23 which the conservatorship proceeding is pending has first made an order
24 authorizing or requiring the fiduciary to modify or revoke the durable power of
25 attorney and the modification or revocation is in accord with the order.

26 (c) This section does not apply to a durable power of attorney for health care.

27 (d) This section is not subject to limitation in the power of attorney.

28 **Comment.** Section 4206 continues former Civil Code Section 2402(a) without substantive
29 change. Subdivision (a) is substantially the same as the official text of Section 3(a) of the
30 Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a) (1991),
31 with several clarifying changes. "Conservator of the estate" has been substituted for
32 "conservator." This change is consistent with the concept of the Uniform Act that the fiduciary to
33 whom the attorney-in-fact under a durable power is accountable and who may revoke or amend
34 the durable power includes only a fiduciary charged with the management of the principal's estate
35 and does not include a person appointed only to exercise protective supervision over the person of
36 the principal. See Unif. Durable Power of Attorney Act § 3 comment (1979); Unif. Prob. Code §
37 5-503 comment (1991). The reference in the Uniform Act to the principal's "disability" is omitted
38 to conform with other provisions of this division. The authority of the fiduciary to revoke or
39 amend is the same as in the official text of Section 3(a) of the Uniform Durable Power of
40 Attorney Act, except that the possibility of a requirement of court approval is recognized, as in
41 subdivision (b) which applies to California conservators.

42 For provisions concerning the powers of conservators, see, e.g., Sections 2252 (powers of
43 temporary conservator), 2403 (petition for instructions), 2580 (petition for proposed action). See
44 also Sections 2(b) (construction of provisions drawn from uniform acts), 4014 ("attorney-in-fact"
45 defined), 4018 ("durable power of attorney" defined), 4026 ("principal" defined).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

1 **Staff Note.** The following sections have been revised to implement decisions made at the
2 January meeting. Some of these provisions are also discussed in the memorandum in connection
3 with suggestions made by Harry Drabkin.

4 **§ 4940. Petitioners**

5 4940. Subject to Sections 4902 and 4903, a petition may be filed under this part
6 by any of the following persons:

7 (a) The attorney-in-fact.

8 (b) The principal.

9 (c) The spouse of the principal.

10 (d) A relative of the principal.

11 (e) The conservator of the person or estate of the principal.

12 (f) The court investigator, described in Section 1454, of the county where the
13 power of attorney was executed or where the principal resides.

14 (g) The public guardian of the county where the power of attorney was executed
15 or where the principal resides.

16 (h) A treating health care provider, with respect to a durable power of attorney
17 for health care.

18 (i) The personal representative or trustee of the principal's estate.

19 (j) The principal's successor in interest.

20 (k) A person who is requested in writing by an attorney-in-fact to take action.

21 (l) Any other interested person or friend of the principal.

22 **Comment.** Section 4940 continues former Civil Code Section 2411 without substantive
23 change, and expands the class of petitioners to include relatives (subdivision (d)), third persons
24 who are requested to honor the power of attorney (subdivision (k)), and any other interested
25 persons or friends of the principal (subdivision (l)). These additions are drawn from the
26 comparable rules governing petitioners for appointment of a conservator under Section 1820. The
27 purposes for which a person may file a petition under this part are limited by other rules. See
28 Sections 4902 (limitation in power of attorney on right to petition), 4903 (exceptions to limitation
29 in power of attorney of right to petition), 4942 (petition with respect to durable power of attorney
30 for health care); see also Section 4901 (other remedies not affected).

31 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026
32 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health
33 care provider" defined).

34 **§ 4941. Petition as to powers of attorney other than durable power of attorney for health** 35 **care**

36 4941. With respect to a power of attorney other than a durable power of attorney
37 for health care, a petition may be filed under this part for any one or more of the
38 following purposes:

39 (a) Determining whether the power of attorney is in effect or has terminated.

40 (b) Passing on the acts or proposed acts of the attorney-in-fact, including
41 approval of authority to disobey the principal's instructions pursuant to
42 subdivision (b) of Section 4234.

1 (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or
2 report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of
3 the principal, the conservator of the person or the estate of the principal, or to any
4 other person required by the court in its discretion, if the attorney-in-fact has failed
5 to submit an accounting or report within 60 days after written request from the
6 person filing the petition.

7 (d) Declaring that the authority of the attorney-in-fact is revoked on a
8 determination by the court of all of the following:

9 (1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties
10 under the power of attorney.

11 (2) At the time of the determination by the court, the principal lacks the capacity
12 to give or to revoke a power of attorney.

13 (3) The revocation of the attorney-in-fact's authority is in the best interest of the
14 principal or the principal's estate.

15 (e) Approving the resignation of the attorney-in-fact:

16 (1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court
17 may approve the resignation, subject to any orders the court determines are
18 necessary to protect the principal's interests.

19 (2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the
20 court shall approve the resignation, subject to the court's discretion to require the
21 attorney-in-fact to give notice to other interested persons.

22 (f) Compelling a third person to honor the authority of an attorney-in-fact.

23 **Comment.** Section 4941 continues former Civil Code Section 2412 without substantive
24 change, except as noted below.

25 The introductory clause limits the application of this section to non-health care powers of
26 attorney. This section applies to petitions concerning both durable and nondurable powers of
27 attorney. See Sections 4022 ("power of attorney" defined), 4050 (scope of division). Section 4942
28 applies to petitions with respect to durable powers of attorney for health care.

29 Subdivision (a) makes clear that a petition may be filed to determine whether the power of
30 attorney was ever effective, thus permitting, for example, a determination that the power of
31 attorney was invalid when executed because its execution was induced by fraud. See also Section
32 4201 (unqualified attorney-in-fact).

33 The authority to petition to disobey the principal's instructions in subdivision (b) is new. This is
34 a limitation on the general agency rule in Civil Code Section 2320. See Section 4234 &
35 Comment.

36 Subdivision (d) requires a court determination that the principal has become incapacitated
37 before the court is authorized to declare the power of attorney terminated because the attorney-in-
38 fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

39 Subdivision (e) is a new procedure for accepting the attorney-in-fact's resignation. The court's
40 discretion in this type of case depends on whether the attorney-in-fact is subject to any duty to act
41 under Section 4230, as in the situation where the attorney-in-fact has agreed in writing to act or is
42 involved in an ongoing transaction. Under subdivision (e)(1) the court may make any necessary
43 protective order. Under subdivision (e)(2), the court's discretion is limited to requiring that notice
44 be given to others who may be expected to look out for the principal's interests, such as a public
45 guardian or a relative. In addition, the attorney-in-fact is required to comply with the statutory
46 duties on termination of authority. See Section 4238.

47 The former limitation of the provision in subdivision (f) to statutory form powers of attorney
48 has been eliminated. See Sections 4300-4308 (relations with third persons).

1 A power of attorney may limit the authority to petition under this part. See Sections 4902
2 (limitation in power of attorney on who may petition), 4903 (exception to limitation in power of
3 attorney).

4 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026
5 (“principal” defined).

6 **§ 4942. Petition as to durable power of attorney for health care**

7 4942. With respect to a durable power of attorney for health care, a petition may
8 be filed under this part for any one or more of the following purposes:

9 (a) Determining whether the durable power of attorney for health care is in effect
10 or has terminated.

11 (b) Determining whether the acts or proposed acts of the attorney-in-fact are
12 consistent with the desires of the principal as expressed in the durable power of
13 attorney for health care or otherwise made known to the court or, where the desires
14 of the principal are unknown or unclear, whether the acts or proposed acts of the
15 attorney-in-fact are in the best interests of the principal.

16 (c) Compelling the attorney-in-fact to report the attorney-in-fact’s acts as
17 attorney-in-fact to the principal, the spouse of the principal, the conservator of the
18 person of the principal, or to any other person required by the court in its
19 discretion, if the attorney-in-fact has failed to submit the report within 10 days
20 after written request from the person filing the petition.

21 (d) Declaring that the durable power of attorney for health care is terminated
22 upon a determination by the court that the attorney-in-fact has made a health care
23 decision for the principal that authorized anything illegal or upon a determination
24 by the court of both of the following:

25 (1) The attorney-in-fact has violated, has failed to perform, or is unfit to perform,
26 the duty under the durable power of attorney for health care to act consistent with
27 the desires of the principal or, where the desires of the principal are unknown or
28 unclear, is acting (by action or inaction) in a manner that is clearly contrary to the
29 best interests of the principal.

30 (2) At the time of the determination by the court, the principal lacks the capacity
31 to execute or to revoke a durable power of attorney for health care.

32 (e) Approving the resignation of the attorney-in-fact:

33 (1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court
34 may approve the resignation, subject to any orders the court determines are
35 necessary to protect the principal’s interests.

36 (2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the
37 court shall approve the resignation, subject to the court’s discretion to require the
38 attorney-in-fact to give notice to other interested persons.

39 **Comment.** Section 4942 continues former Civil Code Section 2412.5 without substantive
40 change, except as noted below. This section enumerates the purposes for which a petition may be
41 filed under this part with respect to a durable power of attorney for health care. Section 4941
42 applies to petitions with respect to other powers of attorney.

43 Under subdivision (b), the desires of the principal as expressed in the durable power of attorney
44 for health care or otherwise made known to the court provide the standard for judging the acts of

1 the attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney
2 for health care where the attorney-in-fact is not complying with the duty to carry out the desires
3 of the principal. These subdivisions adopt a standard based on the principal's desires in place of a
4 general standard of what may constitute the best interests of the principal. An attempted suicide
5 by the principal is not to be construed to indicate the principal's desire that health care be
6 restricted or inhibited. See Civ. Code § 2443 (unauthorized acts and omissions).

7 Where it is not possible to use a standard based on the principal's desires because those desires
8 are not stated in the power of attorney or otherwise known or are unclear, subdivision (b)
9 provides that the "best interests of the principal" standard be used.

10 Subdivision (d) permits termination of the durable power of attorney for health care not only
11 where the attorney-in-fact, for example, is acting illegally or failing to perform his or her duties
12 under the power of attorney or is acting contrary to the known desires of the principal but also
13 where the desires of the principal are unknown or unclear and the attorney-in-fact is acting in a
14 manner that is clearly contrary to the best interests of the principal. The desires of the principal
15 may become unclear as a result of the developments in medical treatment techniques that have
16 occurred since the desires were expressed by the principal, such developments having changed
17 the nature or consequences of the treatment.

18 Subdivision (e) is new. See Section 4941(e) Comment.

19 A durable power of attorney for health care may limit the authority to petition under this part.
20 See Sections 4902 (limitation in power of attorney on who may petition) 4903 (exception to
21 limitation in power of attorney).

22 See also Sections 4014 ("attorney-in-fact" defined), 4606 ("durable power of attorney for
23 health care" defined), 4612 ("health care decision" defined), 4026 ("principal" defined).

24 § 4943. Commencement of proceeding

25 4943. A proceeding under this part is commenced by filing a petition stating
26 facts showing that the petition is authorized under this part, the grounds of the
27 petition, and, if known to the petitioner, the terms of the power of attorney.

28 **Comment.** Section 4943 restates parts of former Civil Code Section 2415 without substantive
29 change. The former reference to filing in the superior court is restated in a different form in
30 Section 4920. The language concerning the grounds of the petition is new and is drawn from
31 Section 17201 (commencement of proceeding under Trust Law). A petition is required to be
32 verified. See Section 1021.

33 See also Section 4022 ("power of attorney" defined).

34 § 4944. Dismissal of petition

35 4944. The court may dismiss a petition if it appears that the proceeding is not
36 reasonably necessary for the protection of the interests of the principal or the
37 principal's estate and shall stay or dismiss the proceeding in whole or in part when
38 required by Section 410.30 of the Code of Civil Procedure.

39 **Comment.** Section 4944 restates former Civil Code Section 2416 without substantive change.
40 The dismissal standard has been revised to permit dismissal when the proceeding is not
41 "reasonably necessary," rather than "necessary" as under the former statute. Under this section,
42 the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial
43 justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. §
44 410.30.

45 See also Section 4026 ("principal" defined).

1 **§ 4945. Notice of hearing**

2 4945. (a) Subject to subdivision (b), at least 15 days before the time set for
3 hearing, the petitioner shall serve notice of the time and place of the hearing,
4 together with a copy of the petition, on the following:

5 (1) The attorney-in-fact if not the petitioner.

6 (2) The principal if not the petitioner.

7 (b) In the case of a petition to compel a third person to honor the authority of an
8 attorney-in-fact, notice of the time and place of the hearing, together with a copy
9 of the petition, shall be served on the third person in the manner provided in
10 Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of
11 Civil Procedure.

12 **Comment.** Subdivision (a) of Section 4945, pertaining to internal affairs of the power of
13 attorney, continues former Civil Code Section 2417(b) without substantive change, except that
14 the notice period is changed to 15 days for consistency with conservatorship proceedings. See
15 Section 1460.

16 Subdivision (b) provides a special rule applicable to service of notice in proceedings involving
17 third persons, i.e., not internal affairs of the power of attorney. See Section 4941(f) (petition to
18 compel third person to honor attorney-in-fact's authority).

19 See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

20 **Staff Note.** This section has been reorganized to provide the new rule in subdivision (b) which
21 was urged by the State Bar Team.

22 **§ 4946. Temporary health care order**

23 4946. With respect to a durable power of attorney for health care, the court in its
24 discretion, upon a showing of good cause, may issue a temporary order prescribing
25 the health care of the principal until the disposition of the petition filed under
26 Section 4942. If a durable power of attorney for health care is in effect and a
27 conservator (including a temporary conservator) of the person is appointed for the
28 principal, the court that appoints the conservator in its discretion, upon a showing
29 of good cause, may issue a temporary order prescribing the health care of the
30 principal, that order to continue in effect for such time as is ordered by the court
31 but in no case longer than the time necessary to permit the filing and determination
32 of a petition filed under Section 4942.

33 **Comment.** Section 4946 continues former Civil Code Section 2417(h) without substantive
34 change. This section is intended to make clear that the court has authority to provide, for example,
35 for the continuance of treatment necessary to keep the principal alive pending the court's action
36 on the petition. See also Section 1046 (court authority to make appropriate orders).

37 See also Sections 4606 ("durable power of attorney for health care" defined), 4609 ("health
38 care" defined), 4026 ("principal" defined).

39 **§ 4947. Award of attorney's fees**

40 4947. In a proceeding under this part commenced by the filing of a petition by a
41 person other than the attorney-in-fact, the court may in its discretion award
42 reasonable attorney's fees to one of the following:

43 (a) The attorney-in-fact, if the court determines that the proceeding was
44 commenced without any reasonable cause.

1 (b) The person commencing the proceeding, if the court determines that the
2 attorney-in-fact has clearly violated the fiduciary duties under the power of
3 attorney or has failed without any reasonable cause or justification to submit
4 accounts or report acts to the principal or conservator of the estate or of the person,
5 as the case may be, after written request from the principal or conservator.

6 **Comment.** Section 4947 continues former Civil Code Section 2417(g) without substantive
7 change. See Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026
8 (“principal” defined).

9 **§ 4948. Appeal**

10 4948. An appeal may be taken from any of the following:

11 (a) Any final order made pursuant to Section 4941, except an order pursuant to
12 subdivision (c) of Section 4941.

13 (b) Any final order made pursuant to Section 4942, except an order pursuant to
14 subdivision (c) of Section 4942.

15 (c) An order dismissing the petition or denying a motion to dismiss under
16 Section 4944.

17 **Comment.** Section 4948 continues former Civil Code Section 2419 without substantive
18 change. The language of the section has been recast to note the exception to the right to appeal,
19 rather than listing the appealable orders under Sections 4941 and 4942. This has the effect of
20 continuing the former rule that all orders are appealable except orders requiring the attorney-in-
21 fact to account. This also remedies an omission that occurred when the authority to petition to
22 compel a third person to honor the attorney-in-facts authority under a statutory form power of
23 attorney was added to former Civil Code Section 2412. See 1992 Cal. Stat. ch. 178, § 3. The
24 reference to “decree” in former Civil Code Section 2419(a) is omitted as unnecessary.



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January 24, 1994

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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RE: TENTATIVE RECOMMENDATION OF COMPREHENSIVE POWER OF
ATTORNEY LAW

Dear Commissioners:

In reviewing the [TENTATIVE RECOMMENDATION OF THE COMPREHENSIVE POWER OF ATTORNEY LAW] dated September 1993, I find that you have continued Civil Code Section 2421(a) in new Section 4902. This section probably could be referred to as the con man's license to steal provision.

Part 5 of the new Act provides for Court review of actions of an attorney-in-fact. Such review can be obtained by the persons enumerated in new Section 4940. Two of those persons are the Court Investigator and the Public Guardian. Those are the officers I often represent. Those offices often receive information that an attorney-in-fact is not properly acting for the principal. When an investigation shows that there is probable cause to believe that an attorney-in-fact is not properly exercising the power of attorney, we can obtain judicial review under these Sections.

If Section 4902(b) is enacted, an intelligent con man can easily see to it that there is no meaningful judicial review of his or her actions. The provision in that Section for a lawyer certificate is extremely naive. First, an intelligent con man can easily plant in the principal's mind that there should be no review, and have the principal demand that the lawyer include that provision in the power of attorney. Second, attorneys are not more nor less honest than the populous as a whole. Attorneys are no more able than the principal to know that the proposed attorney-in-fact is honest or dishonest. An intelligent con man can take his or her principal attorney shopping to find an attorney who will have no problem in preparing such a certificate.

The main purpose of judicial review is to rectify acts by an attorney-in-fact that were not proper. Few, if any, principals at

the time of the establishment of a power of attorney can know that the designated attorney-in-fact will act improperly. To forbid the prospect of judicial review at the establishment of the power of attorney, is to give a blank check to any person who will misuse it.

An example is a person for whom our Public Guardian was recently appointed as conservator. She had executed a power of attorney with a daughter as the attorney-in-fact. That daughter, after placing the principal in a convalescent hospital, proceeded to obtain a \$30,000.00 loan on the mobile home of the principal, and has now disappeared with the proceeds. There is a rumor that she is in Hawaii. The principal continues to disbelieve that her daughter would have done such a thing. This situation is not unusual.

The argument that making this part applicable does not affect the right to resort to any judicial remedies that may otherwise be available is naive. Other judicial remedies that may be available involve expensive litigation. In most of the situations with which I am familiar concerning improper uses of power of attorney, litigation other than that provided by what will be Section 4900 et seq. is out of the financial reach of the principal, or of the persons concerned about him or her.

I think Section 4902 should be rewritten to say only: "This part is not subject to any limitations as to the power of attorney."

Section 4152(a)(3) refers to "the principal's legal representative." There is no definition of that phrase. I assume that means a conservator. I don't know what other legal representative an adult living principal could have except perhaps a guardian in some State were there is no conservator. This should be clarified, and should be better tied into Section 4206.

It is not explicit that Section 4206 includes a temporary conservator. It is not unusual that we apply for a temporary conservatorship to prevent an attorney-in-fact from misusing the assets of the principal. This Section should explicitly include a temporary conservator.

Very truly yours,

MICHAEL H. KRAUSNICK, County Counsel

By *Harry P. Drabkin*
Harry P. Drabkin, Deputy

HPD/sjp